(1) Supreme Court, U.S.
FILED

031358 FEB 12 2004

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No. 03 -

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
Deanell Tacha, Chief Judge,
United States Court of Appeals
for the Tenth Circuit, et al.,
Respondents.

On Appeal to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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END

Preface Statement

Petitioner had filed a Petition for Rehearing En Banc with the DC Circuit. Such Petition detailed that the grounds used for the dismissal of Petitioner's appeal [03-5076], should no longer apply when subject to the pleadings within the Petition.

Question Presented

1. Whether this Court will determine that Petitioner's claim for injunctive relief was well-founded and meritorious ?

Parties Proceeding

Petitioner was plaintiff (01-2627 RBW) in the DC District Court, and subsequently Appellant to the U.S. CoA for the DC Cir. (03-5076).
Respondents are Tacha, 10th Cir. Chief Judge, and Circuit Judges Baldock, Brorby, and Kelly.

Respondents are judges who dismissed Petitioner's 10th Cir. cases [00-2480; 01-2054].
Respondents' contact is through their counsel:

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Forrester v. White, 484 U.S. 219, 228-29 (1988);
Hewitt v. Helms, 482 U.S. 755, 766 (1987);
Mireles v. Waco, 502 U.S. 9, 10 n.1 (1991);
In re Justices of Supreme Court of Puerto Rico, 696 F.2d 17 (1st Cir.1982);
Heimbach v. Lyons, 597 F.2d 344 (2nd Cir. 1979);
Slavin v. Curry, 574 F.2d 1256 (5th Cir.1978);
WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir.1981);
Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979);
Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982).

Rules

Supreme Court ("Sup.Ct.") Rules 10(a), 10(c), 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The U.S. CoA for the DC Cir. denied Petitioner's Petition for Rehearing En Banc (03-5076) with an Order filed on NOV 17, 2003.

Constitutional Provisions at Issue

First Amendment Right of Free Speech
Fifth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case involves retaliations taken upon Petitioner by a former manager of his employer at the time, the United States ("U.S.") Department of Energy ("DOE "). Petitioner is a disabled individual who was employed with the DOE as an Environmental Scientist at the Waste Isolation Pilot Plant ("WIPP ") in Southeastern New Mexico. The WIPP is a nuclear waste repository for the disposal of defense program generated transuranic waste. Petitioner is simply just an honest man.

When Petitioner began making attempts to identify and correct safety deficiencies, the former DOE manager of the WIPP engaged in reprisals towards Petitioner. The retaliations against Petitioner culminated in his removal from federal service during December of 1997 for putative "poor performance".

Subsequent to his removal, Petitioner filed complaints in the U.S. district court for the district of New Mexico, and then appeals with the 10th Circuit. These courts had not addressed the pleadings of Petitioner. E.g.: 748 pages of evidence filed. Petitioner next filed Petition 01-1143 with this Court. After Petition 01-1143 was denied, Petitioner filed a complaint in the DC district court,which was dismissed on the ground, for example, that the 10th Cir. judges were immune from suit. The DC Cir. affirmed the dismissal of the com- plaint. A Petition for Rehearing En Banc (hence- forth "Rehearing") with the DC Cir., requesting only injunctive relief, was filed which is included with, and is the basis of, this instant Petition.

Argument

Question 1.

The original Order (henceforth "8/12 Order") of the DC Cir. dismissing Petitioner's appeal [03-5076] is included below as Appendix 2. There are three issues identified within the 8/12 Order that the DC Cir. used as grounds for the dismissal of 03-5076 which are: 1) "judicial immunity"; 2) "failure to state a claim under Title VII"; and 3) "lack of a private cause of action under 18 U.S.C. §§ 242, 371." App. 2 at A-2, A-3.

To address the ground concerning "18 U.S.C. §§ 242, 371" originally, for example, Petitioner had pointed out that the cases accepted by the lower courts to support their position on this issue were not valid. Petitioner had made this claim because, the cases cited by Appellees [E.g.: *Dugar v. Coughlin*, 613 F.Supp. 849, 852 n.1 (S.D. Ohio 1985)] to support their claim towards 18 U.S.C. §§ 242, 371, did not employ the precedent set by this Court [four-part test within *Cort v. Ash*, 422 U.S. 66, 78 (1975)]. According to this precedent, a court would apply the *Cort* test for determining if there was an implied cause of action within a statute, including those that are criminal.

While Petitioner is of the opinion that he made a very valid point concerning the application of the *Cort* test precedent, this point is moot. All of the grounds specified above for the dismissal of 03-5076 are rendered inapplicable to Petitioner's case if the facts and grounds within his Rehearing are considered. E.g.: The silence of the DOE towards Petition 01-1143 constitutes an adoptive admission of pretext per Fed.R.Evid. 801(d)(2)(B). See *United States v. Andrus*, 775 F.2d 825, 839-40 (7th Cir. 1985); see also page A-10 below. The established pretext relates to the fact that

Petitioner's claim for injunctive relief is meritorious.

Petitioner had learned of another precedent set by this Court, applicable to this case, during the process of his research towards defense against dismissal. In the *Pulliam* case, this Court ruled that judicial immunity did not bar injunctive relief. In comparing the ruling in *Pulliam* to the Administrative Procedures Act, 5 U.S.C. § 701 et seq., Petitioner found that both coincide with allowing injunctive relief while not allowing damages. In filing his requested Rehearing with the DC Cir., Petitioner had respectfully apologized to the court for his previous lack of knowledge in the area of injunctive relief. The entitlement to injunctive relief and irreparable harm suffered in the absence of such relief towards Petitioner are outlined below. See App. 3 at A-6 through A-11.

Conclusion

Are not the rulings of this Court for the purpose of demonstrating the intentions and designs behind the law, to ensure the most uniform and just application of such ? Was this Court's ruling in *Pullium* towards injunctive relief based, in part, upon the Administrative Procedures Act ? It is hoped that the merits of this case have been adequately demonstrated by Petitioner to this Court. Might such case become an example of when relevant facts and case law are effectively presented to this Court, that justice prevails within the greatest democracy in the world . . . the United States ?

Prayer for Relief

What the lower courts were misled into believing about Petitioner, to justify the dismissal of his complaints, by the tyrannical DOE manager of the WIPP at the time, has now been admitted to have been untrue. This has resulted in harmful error towards Petitioner. Petitioner prays that this Court grant this instant Petition, and find that his request for injunctive relief has merit.

Respectfully submitted,

s/Tod N. Rockefeller
319 Sunnyview St.
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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5076 September Term, 2003
01cv02627

TOD N. ROCKEFELLER,
Appellant,
v.

Filed On:
NOV 17 2003

DEANELL TACHA, Chief Judge, United States Court of Appeals for the Tenth Circuit, et al.,
Appellees.

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Michael C. McGrail
Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5076 September Term, 2002
01cv02627

Tod N. Rockefeller, Former,
Environmental Scientist,
United States Depart. of Energy,
Appellant,

v.

DEANELL TACHA, Chief
Judge, United States Court
of Appeals for the Tenth
Circuit, et al.,
Appellees.

Filed On:
AUG 12 2003

BEFORE: Ginsburg, Chief Judge, and Sentelle, and Henderson, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam). The district court properly dismissed appellant's complaint on the grounds of judicial immunity, see Forrester v. White, 484 U.S. 219, 225 (1988); Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); failure to state a claim under

Title VII because of the lack of employment relationship between appellant and appellees; and the lack of a private right of action under 18 U.S.C. §§ 242, 371.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until after seven days after the resolution of any timely petition for rehearing en banc. See Fed.R.App.P. 41(b); D.C. Cir. Rule 41.

Per Curiam

s/Ginsberg, Sentelle, Henderson [Initials]

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

TOD N. ROCKEFELLER, former ENVIRONMENTAL SCIENTIST, WIPP SITE TEAM, CARLSBAD AREA OFFICE, UNITED STATES DEPART. OF ENERGY, Plaintiff / Petitioner - Appellant	**Case No. 03 - 5076**
v.	**Sup.Ct. Pet. 01-1143**
U. S. COURT OF APPEALS FOR THE TENTH CIRCUIT JUDGES: TACHA, Chief Judge, BALDOCK, BRORBY, and KELLY, Circuit Judges, Defen. / Respondents - Appellees.	**10th Circuit Nos. 00-2480; 01-2054**
	USDC - DC No. 01- 2627 RBW
	USDC-NM Nos. 99-1059; 00-652

Petition for Rehearing by the Panel and Petition for Rehearing En Banc

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I. Introduction

Appeal No. 03-5076 was dismissed by this Court with an Order filed on 8/12/03. Petitioner-Appellant is filing a combined pleading as captioned above. See DC Cir. HdBk at 57. Petitioner was a Physical Scientist [GS 1301-13] at the United States ("U.S.") Department of Energy's ("DOE's") Waste Isolation Pilot Plant ("WIPP") , which is a repository for defense program generated transuranic nuclear waste. Petitioner is simply just an honest scientist who was trying to take preventative measures to preclude the possibility of safety deficiencies from turning into disasters, which could be very damaging

to our nation. The DOE had removed Petitioner from federal service during December of 1997 for putative "poor performance". In response to his removal, Petitioner filed complaints in the USDC, appeals in the Tenth Circuit, (as captioned above) and then a Petition for Writ of Certiorari in the Supreme Court ("Sup.Ct.") No. 01-1143. After exhausting all of his avenues of administrative relief [Petition 01-1143], Petitioner filed Complaint No. 01-2627 RBW in the DC district court.

As a result of the proceeding concerning Sup.Ct. Petition 01-1143 [Encl. I to doc. 7 of 01-2627 RBW], Petitioner has established as fact a number of violations of the laws and Constitution of the U.S. by the DOE and the 10th Cir. that will be detailed below. Complaint 01-2627, that was the subject of the appeal in this Court [03-5076], demanded damages in dollars from the Judicial Branch. Petitioner has recently learned that a demand for damages in case 01-2627 is inappropriate as will also be explained below. Injunctive relief only, is what Petitioner can appropriately request from this Court in an Official-capacity suit. See doc. 7 and Amended Complaint. The panel decision in question is attached as "Addendum I".

II. The Constitution of the U.S.

Since the beginning of our nation, the Bill of Rights did not apply to all Americans. E.g.: African-Americans. During the late 1860s, enough of the nation became aware of the plight of African-Americans at the hands of the Klu Klux Klan, and others, to force the Legislature to take action. In response to the crisis above, the Klu Klux Klan Act was enacted [also known as the Civil Rights Enforcement Act of 1871]. Unfortunately, however, for African-Americans, said Act above was essentially ineffectual. It had to take nearly another 100 years, with the enactment of the Civil Rights Act of 1964,

for enforcement of civil rights, for truly all Americans, to become a reality within our nation.

This instant Petition presents a very important issue concerning the democracy of this nation. The question is whether or not enforcement of the Bill of Rights is currently available for all Americans within the present day judicial system of the U.S. ? Is it true that if a law exists, but it is unenforceable, that said law is then without any value and meaningless ? Petitioner was formerly very proud to be a federal employee within the Defense Logistics Agency, especially during "Operation Desert Shield" and "Operation Desert Storm". Petitioner prays that this Court will restore his faith and pride in the Government of this nation by granting this instant Petition for the justifications set forth below.

III. DC Circuit Panels - Injunctive Relief

Panels of this Court have ruled that there are four requirements that must be satisfied for a litigant to be entitled to a grant of injunctive relief. These requirements are:

> "(1) that he is substantially likely to succeed on the merits of the suit, (2) that in the absence of an injunction, he would suffer irreparable harm for which there is no adequate legal remedy, (3) that the injunction would not substantially harm other parties, and (4) that the injunction would not significantly harm the public interest."

See *Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Tenacre Foundation v. INS*, No. 95-5294 (D.C. Cir., March 19th, 1996). Concerning injunctive relief, the Sup.Ct. has stated the following:

> "Under the Court of Appeals' remand order, the District Court could, and probably should, have entered judgment granting the requested declaratory and injunctive relief. Instead, the District Court first took up the question of immunity, and, upon finding qualified immunity, precipitately issued an order closing the case. No order was entered disposing of respondent's pending claims for equitable relief."

See *Hewitt v. Helms*, 482 U.S. 755, 766-67 (1987) (Marshall, J., dissenting). Concerning Appeal No. 03-5076 with this Court, the same is true as quoted from the *Hewitt* case above. After this Court found Defendants immune, an order was filed on 8/12/03 "closing the case", without "disposing" of Petitioner's "pending claims for equitable relief" [remand back to Trial Court as injunctive relief while allowing no damages].

In addition, Appeal No. 03-5076's claim for equitable relief was ripe for a judicial decision. A panel of this Court ruled the following:

> "The two-pronged test for ripeness established by the Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), requires the court to consider both the "fitness" of the issues for judicial decision and the "hardship" to the parties of withholding review. "Purely legal questions," such as those presented in the instant case, are "presumptively [fit] for judicial review." *City of Houston v. HUD*, 24 F.3d 1421, 1431 (D.C. Cir. 1994)(quoting *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 92 (D.C. Cir. 1986)."

See *Chamber of Commerce of the U.S., et al. v. Reich*, No. 95-5135 (D.C. Cir., June 21st, 1995).

As will be demonstrated below, Petitioner's Appeal [03-5076] met the four "requirements" that panels of this Court have ruled which entitled him to injunctive relief, and that Petitioner's pending claims for equitable relief were indeed ripe for a judicial decision.

IV. Judicial Immunity - Injunctive Relief / Damages

The Sup.Ct. and six different U.S. Circuit Courts have all ruled that judicial immunity does not bar injunctive relief. These cases include:

a. *Pulliam v. Allen*, 466 U.S. 522, 528, 537, 541 (1984);
b. *Forrester v. White*, 484 U.S. 219, 228-29 (1988);
c. *Hewitt v. Helms*, 482 U.S. 755, 766 (1987);
d. *Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991);
e. *In re Justices of Supreme Court of Puerto Rico*, 696 F.2d 17 (1st Cir. 1982);
f. *Heimbach v. Lyons*, 597 F.2d 344 (2nd Cir. 1979);
g. *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978);
h. *WXYZ, Inc. v. Hand*, 658 F.2d 420 (6th Cir. 1981);
i. *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979);
j. *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982).

As a result of all of the judgments above, Petitioner should have been granted a remand of his original New Mexico district court cases [99-1059 & 00-652] back to Trial Court as injunctive equitable relief that had been requested from Defendants [10th Cir. Appeal Nos. 00-2480 & 01-2054]. This request for equitable relief has been established as meritorious from the admissions-by-silence of the DOE concerning Sup.Ct. Petition 01-1143 that will be demonstrated below.

The ruling of this Court that Defendant judges are immune from suit now does not matter concerning Petitioner's Appeal [03-5076]. Judicial immunity is not being challenged any longer by Petitioner-Appellant. No damages in dollars can therefore be demanded, only injunctive relief. Petitioner came to this conclusion after studying both the Sup.Ct. ruling in *Pulliam*, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 et seq.. For a 42 U.S.C. § 1983 complaint reviewing an agency action under the APA, no damages are allowed only injunctive relief. See 5 U.S.C. § 702. The requirement noted above of the APA coincides with the ruling in *Pulliam* concerning § 1983 claims against a member of the judiciary [no damages allowed only injunctive relief]. For this reason, Petitioner realized that only injunctive relief is available to him, no damages. Petitioner respectfully apologizes to this Court for his lack of knowledge of the law in this regard.

V. Entitlement to Injunctive Relief

a. Meritorious Claims of Petitioner - as described above, Petitioner had filed Petition No. 01-1143 with the Sup.Ct.. Within said Petition, it is specifically outlined how facts concerning the DOE and the removal of Petitioner from federal service amounted to pretext for his termination. Also, that the DOE had made several knowingly false representations concerning Petitioner's Equal Employment Opportunity ("EEO") Complaints investigation. See doc. 7 at 4 through 7, and doc. 7's Enclosure I at A-31 through A-46 [Petition 01-1143]. The DOE had remained silent concerning the allegations within Petition 01-1143 and had admitted to them by the well-established doctrine of admission-by-silence. The 9th Cir. has ruled that:

"The general rule concerning admissions-

> **by-silence or acquiescence is well established.** When an accusatory statement is made in the defendant's presence and hearing, and he understands and has the opportunity to deny it, the statement and his failure to deny are admissible against him."

See *United States v. Moore*, 522 F.2d 1068, 1075 (9th Cir. 1975); see also *Arpan v. United States*, 260 F.2d 649, 655-57 (8th Cir. 1958); *Commonwealth v. Kruah*, No. 97-P-2164 (Mass. App. Ct., July 21st, 1999); *Commonwealth v. MacKenzie*, 413 Mass. 498, 506 (1992); *Commonwealth v. Olszewski*, 416 Mass. 707, 718 (1993), cert. denied, 513 U.S. 835 (1994); *Fletcher v. Weir*, 455 U.S. 603, 607 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 238-40 (1980); *Osborne v. United States*, 371 F.2d 913, 921 (9th Cir. 1967); *United States v. Andrus*, 775 F.2d 825, 839-40 (7th Cir.1985); *United States v. Aponte*, 31 F.3d 86, 87 (2nd Cir. 1994); *United States v. Flecha*, 539 F.2d 874, 877 (2nd Cir. 1976); *United States v. Giese*, 597 F.2d 1170, 1195-96 (9th Cir. 1979);*United States v. Oplinger*, 150 F.3d 1061, 1072 (9th Cir. 1998); *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *Wiedemann v. Walpole*, 2 Q.B. 534, 539 (1891).

Defendants had also violated the due process rights of Petitioner by affirming the district court's improper exclusion of 748 pages of relevant admissible evidence that had been filed. A number of additional violations were suffered by Petitioner. See doc. 7's Encl. I at A-31 through A-46. Petitioner most certainly was likely to succeed on the merits of his 10th Cir. Appeals [00-2480 & 01-2054]. Petitioner has indeed suffered from due process violations of Defendants. The Sup.Ct. has ruled that a court is supposed to be forbidden to violate a party's due process rights. See *Davis v. Passman*, 442 U.S. 228, 234 (1979).

b. In the Absence of an Injunction - if this remains so, Petitioner will suffer irreparable harm. Petitioner's career has been killed by the DOE. Employment was sought by Petitioner

with numerous employers which did not result even with just being interviewed. All of Petitioner's employment applications had been denied. In addition, the DOE has admitted to blacklisting Petitioner at the Carlsbad Environmental Monitoring and Research Center ("CEMRC"). Petitioner had applied for a position at CEMRC [a facility that is partially funded by the DOE]. As noted above, Petitioner did not even get an interview with CEMRC despite his directly related graduate degree and years of very relevant experience. E.g.: Petitioner was an Atmospheric Research Scientist at the DOE's Environmental Measurements Laboratory ("EML") in New York City. **At EML, Petitioner had been working on the characterization of air masses to aid in the ability to predict global climate change.** Rather than hire Petitioner, CEMRC hired a Mr. Jeremy Staley who had NO college degree or relevant experience (emphasis added). This was specifically outlined within Petition 01-1143 at A-42. The DOE has admitted-by-silence to the blacklisting of Petitioner.

Petitioner had worked very hard at developing a career with quite a few years of taking his college classes at night, while working full-time during the day to pay for his education himself. All of the career aspirations of Petitioner have been destroyed by the DOE. Petitioner was never a poor performer as the DOE has now admitted to. Petitioner has no training in regard to the law, yet he has successfully docketed four petitions with the Sup.Ct.. This fact alone would very likely prevent any jury from finding that Petitioner had ever been a poor performer [the claim the DOE used to remove Petitioner from federal service]. Petitioner never had any desire to be criticizing the Government and battling the DOE in court. A humble prayer is made by Petitioner for this Court to show him justice done.

c. An Injunction's Harm to Defendants or the Public - if this Court grants this instant Petition, and then subsequently grants the injunctive relief that is sought noted above [remand back to Trial Court], no harm will come to the 10th Cir. Defendants. No damages can be sought towards the Defendants as outlined

above. All Petitioner wants to have vindicated is his Seventh Amendment right to a fair jury trial towards the DOE. Injunctive relief as such would certainly be of no harm to the public, but would actually be of value by affirming the strength of the Bill of Rights.

VI.. Conclusion

This Court's 8/12/03 Order dismissing Appeal No. 03-5076 details three justifications. The first is the "judicial immunity" of Defendants, the second is "failure to state a claim under Title VII", and third is "the lack of a private right of action under 18 U.S.C. §§ 242, 371." Since Petitioner has outlined that he can only seek injunctive relief and no damages against Defendants, these justifications for the dismissal of this Appeal [03-5076] are moot as detailed above. Petitioner has demonstrated, within this instant Petition, that there are well-founded justifications for granting him the injunctive relief that he seeks. In additional support, the Sup.Ct. has ruled that:

> "Indeed, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right.

See *Davis*, 442 U.S. at 242. Petitioner prays that this Court "enforce this constitutional right".

Prayer for Relief

Petitioner prays that this Court issues an order granting this instant Petition for the justifications outlined above. Such an order would be a very large step towards vindicating Petitioner's constitutional rights and restoring faith in his government.

Respectfully submitted,

s/Tod N. Rockefeller, pro se
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Dated & Served: September 25th, 2003

Supreme Court, U.S.
FILED

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On Appeal to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL APPENDIX NOS. 4 and 5

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APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,

Doc. 21

Plaintiff,

v.

Civ. No. 01-2627

UNITED STATES COURT OF APPEALS OFFICE, FOR THE TENTH CIRCUIT JUDGES, et al.,

FILED
FEB 10 2003

Defendants.

MEMORANDUM OPINION

This matter comes before the Court upon defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] The plaintiff's complaint alleges that the defendants are: (1) criminally liable under 18 U.S.C. §§ 242 and 371 (2000), for violations of the plaintiff's First, Fifth , and Seventh Amendment rights of the United States Constitution; and (2) civilly liable for damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) ("Title VII"), as a result of his termination by the United States Department of Energy ("DOE"), purportedly in retaliation for allegations he made that the DOE had

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1. Because of the plaintiff's status as a pro se litigant, this Court issued an Order on January 3, 2003, as required by Fox v. Strictland, 837 F.2d 507 (D.C. Cir. 1988), wherein the plaintiff was notified of the potential consequences of failing to fully and completely respond to the defendants' dismissal motion. The plaintiff has failed to respond to the Court's Order.

engaged in violations of safety and environmental laws.[2] Original Complaint ("Compl.") at 1. Upon consideration

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2. While it is unclear from the plaintiff's original complaint whether he is asserting claims against the defendants in both their official and individual capacities, in a subsequent memorandum submitted to the Court, he clearly states that his claims are only against the defendants in their official capacities. See Memorandum in Support of Motion for Leave of Court to File Amended Complaint and Judicial Notice of Adjudicative Facts ¶ 37. In addition, in this same memorandum, the plaintiff sought leave of court to amend his com- plaint to indicate that this Court should take judicial notice of certain adjudicative facts that he claims the defendants admitted to by not filing a brief in opposition to his petition for a writ of certiorari before the United States Supreme Court. Apparently , the plaintiff is also seeking to add the Chief Justice's name to the list of defendants in the caption of this case. While this Court recognizes that pursuant to Fed.R.Civ.P. 15(a) leave to file an amended complaint "shall be freely given when justice so requires[,]" the Court concludes that no such need exists in this case. The Court agrees with the defendants that justice does not require the amendment of a complaint when such an amendment would be futile. See James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996); Moldea v. New York Times, 22 F.3d 310, 319 (D.C. Cir. 1994). First, the Court notes that the defendants in this case are not parties to the case that is the subject of the plaintiff's petition for a writ of certiorari and thus were not obligated to file a brief with the Supreme Court in that case. In addition, even if they had been parties in that case, the filing of an opposition brief is voluntary and not a mandatory obligation and therefore the failure to file an opposition cannot constitute an admission. See Sup.Ct. R. 12(6). Second, the Court notes that the plaintiff's apparent attempt to add Chief Justice Rehnquist as a defendant in this case is futile. This is because the plaintiff fails to assert any additional claims against the Chief Justice that would survive a motion to dismiss, as he failed to assert any factual allegations or claims against Chief Justice Rehnquist, and even if he had, any such claims against Chief Justice Rehnquist would have to be dismissed for the same reasons the Court, as set forth below, is dismissing the claims against the New Mexico district judge and the Tenth Circuit judges.

of the parties' submissions regarding the defendants' motion and for the reasons set forth below, the Court will grant the defendants' motion to dismiss because it is impermissible to bring a private cause of action under 18 U.S.C. §§ 242 and 371. Also, the plaintiff has failed to state a claim upon which relief can be granted under Title VII because he has never been an employee of the defendants. In addition, the Court notes that even if it were to construe the plaintiff's pro se complaint liberally and conclude that a claim under 42 U.S.C. § 1983 (2000) has been asserted, the claim would still have to be dismissed. This is because a § 1983 claim upon which relief could be granted can never be established against a federal government official for the performance of his or her official duties, and in any event the defendants are entitled to the protection of absolute immunity.[3]

I. Factual Background

In April 1993, the plaintiff began his employment at the DOE as an Environmental Scientist at the Carlsbad Area Office in Southeastern New Mexico. Compl. ¶ 9. In September 1997, the plaintiff filed a claim with the DOE's Merit System Protection Board ("MSPB") after the DOE notified him that it proposed to terminate his employment because of poor job performance. See Rockefeller v. Abraham, Nos. 01-2054, 00-2480, 2001 WL 1434623 , at *1 (10th Cir. Nov. 15, 2001). In his claim before the MSPB, the plaintiff alleged that the proposed termination was in retaliation for alleged whistle-

3. The defendants also assert that the plaintiff's complaint should be dismissed pursuant to Fed.R.Civ.P 12(b)(1), 12(b)(3), and 12(b)(5) for lack of subject matter jurisdiction, personal jurisdiction, and venue. However, this Court need not address these arguments because it concludes that dismissal is appropriate on other grounds.

blowing activities he had engaged in regarding his prior identification of the DOE's purported violations of safety and environmental laws. Id. In November 1997, an MSPB administrative judge issued an initial decision finding that the plaintiff had not engaged in protected whistle-blowing activities, and the plaintiff filed a petition for review of that decision with the MSPB. Id.

Upon actually being terminated by the DOE in December 1997, the plaintiff filed another claim with the MSPB asserting that he was fired because of an alleged disability, as retaliation for having engaged in protected activities.[4] Id. After an administrative hearing was held on these claims, the MSPB ruled in favor of the DOE, concluding that it had sustained its burden of proof by demonstrating that the plaintiff's termination was due to his unacceptable job performance. Id. In addition, the MSPB held that the plaintiff failed to prove that he engaged in protected whistle-blowing activity, that his termination resulted from employment discrimination, that he suffered from a disability, or that his termination was related to a disability. Id. Plaintiff then filed a petition for review with the MSPB, which was later then voluntarily dismissed by the plaintiff. Id. In granting the plaintiff's request for voluntary dismissal, the MSPB required that if plaintiff re-filed his petition, he had to do so by a specified deadline. Id. When plaintiff attempted to re-file his petition after the expiration of the designated deadline, the MSPB denied the petition due to its untimeliness and the plaintiff's failure to show good cause why it should be accepted late. Id

Thereafter, the plaintiff filed a complaint with the Equal Employment Opportunity Commission,

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4. The nature of the plaintiff's alleged disability is unclear from what is set forth in the complaint.

which was later denied for lack of jurisdiction. Id. After the EEOC dismissal, the plaintiff filed a complaint in the United States District Court for the District of New Mexico alleging that: (1) the DOE denied him reasonable accommodations for his dis abilities as guaranteed by the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12,181- 89 (2000), and the Rehabilitation Act, 29 U.S.C. §§ 701- 96 (2000); and (2) he suffered an adverse employment action in violation of Title VII by being placed under a "Performance Improvement Plan" in retaliation for complaining to the DOE's Equal Employment Opportunity Office ("EEO"). See Rockefeller, 2001 WL 1434623, at *2. The plaintiff then amended his complaint to include an allegation that he was improperly removed from his employment for engaging in whistle-blowing activities, in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h) (2000). See Rockefeller 2001 WL 1434623, at *2. The plaintiff later filed another complaint, which was consolidated with his amended complaint, wherein he alleged that the DOE violated the ADA and Rehabilitation Act by intimidating his physicians in an effort to prevent him from receiving proper treatment. Id.

While the plaintiff's case was pending before the District Court of New Mexico, he filed several motions, including a motion to compel production of documents and a motion for the court to accept a 748-page document as self-authenticating. Id. The district judge denied the motion to compel on the grounds that it was overly broad and unduly burden -some. The court also denied the motion for the acceptance of the putative self-authenticated document, but instructed the plaintiff to submit for its consideration any parts of the document that he believed would preclude the entry of summary judgment for the defendant. Id. The district court awarded summary judgment to the defendant on the

ADA and Rehabilitation Act claims on the ground that both acts authorize an employer to request an employee's medical information while a request for an accommodation due to a claimed disability is under consideration. Id. The court dismissed the plaintiff's remaining claims because (1) section 3730(h) of the FCA does not provide a remedy for discrimination against a federal employee, such as the plaintiff, but rather, is only applicable to a suit by a private person; (2) the court lacked jurisdiction over the MSPB appeal, as only the United States Court of Appeals for the Federal Circuit has jurisdiction to review MSPB jurisdictional decisions involving mixed claims; and (3) the complaint filed in the district court was untimely. Id at 2-4. The plaintiff appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's decision and denied the plaintiff's motion for a remand. The plaintiff subsequently filed the complaint that is now before this Court, in which he has named as defendants the district court judge in New Mexico who presided over his case that was filed there and the Tenth Circuit judges who comprised the three-judge panel that affirmed the district judge's rulings.

II. Standard of Review: Rule 12(b)(6)

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P 12(b)(6), this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts alleged. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court need not accept inferences or conclusory allegations that are unsupported by

the facts set forth in the complaint. Kowal, 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incor- porated by reference in the complaint, and matters about which the Court may take judicial notice. E.E.O.C. v. St. Francis Xavier Paraochial Sch., 117 F.3d 621, 624-25 (D.C. Cir. 1997). The Court may dismiss a claim pur- suant to Rule 12(b)(6) only if the defendant can demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

III. Legal Analysis

(A) The Plaintiff's Claims Pursuant to 18 U.S.C. §§ 242, 371 for Violations of his Constitutional Rights.

The plaintiff brings this pro se action against the defendants under 18 U.S.C. §§ 242 and 371 (2000) for alleged violations of the First, Fifth, and Seventh Amendments of the United States Constitution. However, the plaintiff is precluded from asserting any claims pursuant to 18 U.S.C. §§ 242 and 371 because, as criminal statues, they do not convey a private right of action. See Dugar v. Coughlin, 613 F. Supp. 849, 852 n.1 (S.D. N.Y. 1981) (stating that 18 U.S.C. § 242 does not create a private right of action); Fiorino v. Turner, 476 F.Supp. 962, 963 (D. Mass. 1979) ("With regard to the alleged violations of 18 U.S.C. §§ . . . 242 [and] . . . 371 . . . the plaintiff has failed to cite, and the court has been unable to locate, any authority which would support implying a civil cause of action for violations of these provisions."). Therefore, the Court must dismiss the plaintiff's claims that have been brought pursuant to 18 U.S.C. §§ 242 and 371.

(B) The Plaintiff's Claims Pursuant to Title VII

The plaintiff has also filed a claim under Title VII of the United States Code. Title VII makes it unlawful for an employer to discriminate against any of its employees. See 42 U.S.C. § 2000e. Thus, the determination of whether an individual is an employee os of "crucial significance for those seeking to redress alleged discriminatory actions in federal employment." Spirides v. Reinhardt, 613 F.2d 826, 829-30 (D.C. Cir. 1979). The analysis used to determine whether an employee-employer relationship exists requires the Court to weigh numerous factors regarding the work relationship. Although no one factor is determinative, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review. See Redd v. Summers, 232 F.3d 933, 938 (D.C. Cir. 2000) (quoting Spirides, 613 F.2d at 831). The other additional factors for the Court to consider include: (1) the kind of occupation; (2) the skill required; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes, and (11) the intention of the parties. Id. at 939. Applying each of these factors to the instant case, it is abundantly clear that the plaintiff has never been an employee of the defendants, but was merely a party to a lawsuit presided over by the defendant judges. Therefore, the Court is compelled to find that the plaintiff has failed to state a claim upon which relief can be granted under Title VII.

Accordingly, the plaintiff's Title VII claim must also be dismissed.

(C) The Plaintiff's Status as a Pro Se Party and the Liberal Construction of his Complaint

Although the Court finds that a liberal reading of the plaintiff's complaint requires the conclusion that he has failed to state a claim upon which relief can be granted, because the plaintiff is a pro se litigant, his complaint must be construed liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding that allegation in pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers). For example, in Dixon v. State of Maryland by Carter, 261 F.Supp. 746, 747 (D. Md. 1966), where the court was faced with a pro se complaint alleging a private cause of action pursuant to 18 U.S.C. § 242, the court liberally construed the plaintiff's complaint as asserting a claim for a violation under 42 U.S.C. § 1983 because it recognized that the plaintiff could not pursue a civil claim pursuant to 18 U.S.C. § 242. Id.; see also Powell, 511 F.Supp. at 704. Viewing the complaint here even from a liberal perspective, however, does not yield a different result.

(1) The Plaintiff is Unable to State a Claim Under 42 U.S.C. § 1983

Even if a liberal construction of the plaintiff's complaint permitted the Court to conclude that a claim pursuant to 42 U.S.C. § 1983 was being asserted, the plaintiff would still be unable to state a claim upon which relief can be granted. To estab - lish a claim under § 1983, a plaintiff must prove two elements: (1) "that the defen- dant deprived him of a right secured by the Constitution and the laws of the United States" and (2) "the . . . defendant deprived him of this constitutional right under color of . . . State [law]." Adickes v. Kress & Co., 398 U.S.

144, 150 (1970). However, the "[a]ctions of the Federal Government or its officers are exempt from [§ 1983's] proscriptions." Powell, 511 F.Supp. at 704 (citing District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973)) Thus, because all of the acts the plaintiff is challenging were being performed by individuals who were acting in their official capacities as federal government officials, the defendants' acts are exempt from suit under § 1983.

(2) The Defendants are Protected by Absolute Immunity

The Supreme Court has established two avenues by which public officials may receive immunity from personal liability in a civil action for damages: absolute and qualified immunity. To determine whether an official is entitled to either absolute or qualified immunity depends upon the function being performed by that official. See Forester v. White, 484 U.S. 219, 224 (1988). A public official performing a discretionary function receives qualified immunity in a civil action, provided that his or her conduct does not violate "clearly established federal statutory or constitutional rights" of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1972). On the other hand, absolute immunity is provided when the plaintiff's claim against the defendant is directly attributable to the defendant's performance of judicial, legislative, or prosecutorial functions. See Forrester, 484 U.S. at 227. In Forrester, the Supreme Court stated that judges enjoy absolute immunity from personal liability for their judicial or adjudicatory acts. 484 U.S. at 227-28 (1988). Forrester described quintessential judicial acts as being those that "involve resolving disputes between parties who have invoked the jurisdiction of a court." Id. What distinguishes a judicial act from an administrative

act is the character of the act itself, rather than who is making the decision. Id. (citations omitted). In addition to the requirement that such officials must act within their judicial capacity to be afforded absolute immunity, they must also not be doing so in the "clear absence of all jurisdiction." See Stump v. Sparkman, 435 U.S. 349, 354-55 (1978) (quoting Bradley v. Fisher, 13 Wall. 335, 351 (1872)) (granting a judge absolute immunity because he satisfied both requirements of having acted within his judicial capacity in a matter over which he had jurisdiction.). The Forrester Court explained that the purpose of absolute immunity is to prevent an influx of "powerful incentives for judges to avoid rendering decisions likely to provoke such suits." 484 U.S. at 227-28 (citations omitted).

In this case, it is clear that the plaintiff is precluded from asserting any claims against the district and circuit judges for the roles they played in the adjudication of the claims he filed in the New Mexico litigation. This is because the judges were clearly acting in their judicial capacity in a matter over which they clearly had proper jurisdiction. The district judge was clearly acting within his judicial capacity when, in connection with addressing issues related to the claims raised in the plaintiff's complaint, the judge, for example, ruled that certain evidence would be excluded, determined whether the 748-page document offered by plaintiff qualified as a self-authenticated document, permitted physicians to view plaintiff's medical history, determined which statute of limitations was applicable to the case, dismissed a claim for lack of jurisdiction, and disallowed a private claim because it had been filed under the FCA. Likewise, the circuit judges were also acting within their judicial capacity when they reviewed the district court's decisions. These actions were taken in an effort to resolve a legal dispute

that had been initiated by the plaintiff, and therefore, are clearly within the quintessential definition of judicial acts as defined in Forrester. In addition, it is undisputed that both the District Court, under 28 U.S.C. § 1331 (2000),[5] and the Circuit Court, under 28 U.S.C. § 1291 (2000),[6] acted within their jurisdiction when they performed the acts being challenged by the plaintiff in the lawsuit now before this Court. Accordingly, all of the defendant judges are entitled to absolute immunity, and are therefore shielded from any civil liability for the acts they performed.

IV. Conclusion

In view of the foregoing analysis, the plaintiff's claims against the defendants must be dismissed because they fail to state any claims upon which relief can be granted.[7]

SO ORDERED this 7th day of February, 2003.

s/Reggie B. Walton
United States District Judge

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5. Under 28 U.S.C. § 1331, a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The plaintiff's claims for violations of the ADA, Rehabilitation Act, and Title VII, that he pursued in the New Mexico court were clearly claims arising under federal law.

6. 28 U.S.C. § 1291 provides that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." There is no dispute that the Tenth Circuit had jurisdiction to review the final decisions of the New Mexico district court.

7. An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER, Plaintiff, v. BILL RICHARDSON, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE), Defendant.	}	No. 99 -1059 PK/KBM

RESPONSE TO DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGEMENT

The relevant portion of this pleading follows below in regard to the issue of untimeliness.

Defendant makes three arguments, the first is that: "This Court Lacks Jurisdiction Because Plaintiff's Judicial Complaint is Untimely." Defendant also claims that the thirty day period to file an appeal of an MSPB decision is jurisdictional. Plaintiff will outline below alleged continuing violations of Defendant towards Plaintiff. The United States Supreme Court has ruled that:

> "...filing a timely charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to . . . Title VII ( ) is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to

waiver, estoppel, and equitable tolling ..." See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

The Tenth Circuit has ruled that "the Continuing Violation theory is an equitable tolling doctrine . . ." See Patricia Baty v. Willamette Industries, Inc., No. 96-2181 JWL in the D.C. Kansas. See also Seals v. Oil Data, Inc., No. 96-5149, 1977 U.S. App. LEXIS 2360, 1997 WL 57133 at *1 (**10th Cir.** Feb. 12, 1997) (citing Mascheroni v. Board of Regents, 28 F.3d 1554, 1560 (**10th Cir.** 1994)).

Plaintiff filed a Petition for Review with the Board of the MSPB's 4/6/98 Initial Decision, and subsequently a motion to dismiss his petition for Board review without prejudice until December 15, 1998, or until 30 days from the date of a final decision by the DOL, whichever occurred first, which was granted. Plaintiff re-filed his petitions with the Board on 1/25/99, and requested another dismissal without prejudice (41 days late). This untimely filing is subject to equitable tolling of the continuing violation doctrine as outlined above.

To benefit from the continuing violation theory, the plaintiff must show either (1) a series of related acts taken against a single individual, one or more of which falls within the limitations period or (2) the maintenance of company-wide policy of discrimination both before and during the limitations period which evidences a pervasive institutionalized system of discrimination. See Parrett v. Raytheon Co., No. 95-3146, 1996 U.S. App. LEXIS 4468, 1996 WL 108494 at *5 (**10th Cir.** Feb. 29, 1996) (citing Purrington v. University of Utah, 996 F.2d 1025, 1028-29 (10th Cir. 1993); Bruno v. Western Elec. Co., 829 F.2d 957, 961 (**10th Cir.** 1987)).

With respect to the first option above, the **Tenth Circuit** has set forth several nonexclusive considerations to help determine whether the alleged incidents of discrimination constitute a continuing violation or are discrete unrelated acts: (1) subject matter; (2) frequency; and (3) permanence. Mascheroni, 28 F.3d at 1561.

Subsequent to his removal on 12/10/97 Plaintiff had sought employment with no success. Plaintiff knows that there is significant competition for very few jobs in Southern New Mexico. Due to this fact and the absence of any solid evidence, Plaintiff had no reasonable basis for filing a complaint against Defendant due to his rights being violated. See Galloway v. General Motors Service Parts Operations, 78 F.3d 1166 (7th Cir. 1996); Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 344 (7th Cir. 1999); Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998).

Up to and after the period of delay (12/15/98 to 1/25/99) for Plaintiff to re-file his petitions to the Board, Plaintiff had no reasonable basis to assume that his rights were being violated by Defendant. This changed on 9/26/99 when Plaintiff learned that the Carlsbad Environmental Monitoring and Research Center ("CEMRC"), funded by the Defendant, had hired an individual who had no college degree for a job that Plaintiff had applied for. Plaintiff received a notice from CEMRC that he would not be hired only a couple of weeks before the individual with no college degree was hired. Plaintiff had more than seven years of experience and a graduate degree that were directly related to the CEMRC job. Plaintiff then became very aware that his rights were allegedly being violated by Defendant in the same manner as when he had been an employee of Defendant. E.g.: his character and abilities were

being attacked to effect his employment. Plaintiff applied for many jobs, with the vast majority of the prospective employers not expressing any interest in hiring Plaintiff despite his high educational level and very broad range of experience.

Plaintiff had applied for three jobs during the period of delay (12/15/98 to 1/20/99) without any results. See Exhibits BL-6 thru BL-8 of Evidence of the Alleged Unlawful Blacklisting of Plaintiff served on 10/3/00. This allegation of Continuing Violation satisfies the first option above of "a series of related acts taken against a single individual" and also satisfies the three "nonexclusive considerations" set by the **Tenth Circuit** noted above.

In addition to satisfying the first option for showing continuing violation, Defendant's alleged violations have also satisfied the second option of demonstrating institutional type violations before, during, and after the period of delay. From 1/93 thru 1/96, while Plaintiff was an employee of Defendant, Exhibit O'Leary enclosed at 10, 15, & 20 - 25 clearly demonstrates institutional type violations of Defendant. During the 41 day period of delay are Exhibits DOL-1thru DOL-3 enclosed. Exhibit DOL-1 was received by Plaintiff on 12/15/98 and the delay of receipt of this document dated 12/11/98 was experienced by Plaintiff's DOL Complaint attorney Mr. Edward Slavin, Jr.. A complaint was expressed about the delay in receipt of Exhibit DOL-1, and this is why Plaintiff received the next document from Defendant, Exhibit DOL-3, by Federal Express. One example of a knowingly false representation, which is alleged to have been passed on to DOL judge Lasky by Mr. Ron O'Dowd of Defendant's Albuquerque office, was that Plaintiff had made a "mere oral comment" on 1/5/98 to an agent of the

Environmental Protection Agency ("EPA"). Defendant has used this knowingly false representation to eliminate jurisdiction of Plaintiff's claims related to the Clean Air Act ("CAA") employee protection provision coverage. See Exhibit DOL-1 at 4.

Defendant admits that Plaintiff made written comments and NOT a mere oral comment to EPA. See Exhibit DOL-3 at 3. This admitted violation is described within Exhibit DOL-2 at 1 thru 3. Numerous individuals, part of Defendant's agency, know of this false representation made for the express purpose of stripping Plaintiff of his civil rights and nothing has been done to correct this violation. This argument is an independent basis to justify the application of the Continuing Violation Doctrine. See Parrett v. Raytheon Co., No. 95-3146, 1996 U.S. App. LEXIS 4468, 1996 WL 108494 at *5 (**10th Cir.** Feb. 29, 1996).

The institutional type Title VII violations of Defendant continue on to this day with no end in sight. This is clearly demonstrated within the enclosed Additional Evidence of the Alleged Unlawful Processing of Plaintiff's Fifth EEO Complaint of Discrimination and Retaliations ("Exhibit EEO-V Processing - II") and the initial evidence of this served on 10/3/00.

The second argument that Defendant makes is that: "This Court Lacks Jurisdiction to the Extent Plaintiff is Appealing the Board's Dismissal of His Claims for Untimeliness." First of all, the U.S. Supreme Court has ruled that filing a timely Title VII charge is not jurisdictional and subject to equitable tolling. Plaintiff is not appealing the Board's dismissal of his claims for untimeliness. What is being appealed is the Board's lack of review of Plaintiff's case on its

merits. The continuing violations of Defendant should equitably toll the issue of untimeliness as outlined above. With the untimeliness issue equitably tolled, the United States Court of Appeals for the Federal Circuit does not have jurisdiction to review Plaintiff's case on it merits per 5 U.S.C. § 7703 (a) (2).

If the argument Plaintiff made in support of this Court's granting him equitable tolling for the issue of untimeliness is sound, Defendant's argument directly above is moot. **If Defendant's argument here was accepted, it would** make the equitable tolling for the continuing violations doctrine meaningless and overturn all of the case law Plaintiff cited above. Also, when considering a motion for summary judgement, the court must examine all the evidence in the light most favorable to the non-moving party. See Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995); Adikes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

Prayer for Relief:

Plaintiff prays that this Court will recognize, thru the very specific detailing above, that the Continuing Violation Doctrine does indeed apply to this instant case, grant Plaintiff equitable tolling for untimeliness, and deny Defendant's Motion for Partial Summary Judgement.

Dated: October 16th, 2000

Respectfully submitted,
s/Tod N. Rockefeller
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